

Patent Remedies: Can *Quanta* Finish What *eBay* Started?

John A. Squires
Chair SIFMA IP Subcommittee
Chief IP Counsel
Goldman Sachs & Co.

Federal Trade Commission Workshop
Washington, D.C.
December 5, 2008

Financial Services eBay Amicus

Four major financial services industry associations weigh-in to the U.S. Supreme Court as amici in *eBay* case:

Why?

- Equate automatic injunction rule with “Operational Risk”
- Show outdated legal rule affects industry interests differently
- Demonstrate that the market values patent rights differently depending upon who holds them

eBay and Market Valuation:

Operational Commercial Competitors:

- irreparable market harm >

injunction likelihood increases

NPE:

- monetary damages may make whole >

injunction likelihood decreases

Cell Phone Example with Manufacturers based on Specific Contribution Valuation

Company E Sells Phone retail for **\$10.00**

4 Patented Components

	<u>Cost</u>	<u>Royalty Rate</u>	<u>Total</u>
Supplier A	\$2.00	10%	\$2.20
Supplier B	\$2.00	10%	\$2.20
Supplier C	\$2.00	10%	\$2.20
Supplier D	\$2.00	10%	\$2.20
TOTAL COST (to manufacture)			\$8.80
Profit = (\$10.00 - \$8.80)			= \$1.20

12% ROI

Cell Phone Example with NPE and Entire Market Value

- E Sells Phone for **\$10.00**
- 4 Patented Components

	<u>Cost</u>	<u>Royalty Rate</u>	<u>Total</u>
Supplier A	\$2.00	10%	\$2.20
Supplier B	\$2.00	10%	\$2.20
Supplier C	\$2.00	10%	\$2.20
NPE D	\$2.00	5% (<i>EMV of \$10.00</i>)	\$2.50
TOTAL COST			\$9.10

Profit \$10.00 - \$9.10 = \$1.90

9% ROI

Consequences

- Incentive is to litigate rather than negotiate
 - 25% reduction in ROI
 - Chills Innovation
- Skewed valuation through litigation incentive due to entire market value gaming does not aid commercialization because NPE's do not have
 - the fixed cost structure of manufactures/suppliers
 - and are otherwise incentivized to maximize short-term gain

Quanta Confirms

- Patent Exhaustion Doctrine
- Court concerned with parties in licensing context using patents to secure market control over related, but unpatented items
- Same concern applies to damages remedies - using entire market value rule to obtain royalty on related, but unpatented items